PROFESSIONAL SERVICES COUNCIL

May 24, 2004

Defense Acquisition Regulation Council
Attn: Ms. Amy Williams
OUSD(AT&L)DPAP(DAR) IMD 3C132
3062 Defense Pentagon
Washington, D.C. 20301-3062

Ref: DFARS Case 2003-D087

Dear Ms. Williams:

The Professional Services Council (PSC) is pleased to submit the following comments on the DFARS proposed rule, published on March 23, 2003 (69 Fed. Reg.13500), to address issues related to performance outside the United States of contractor employees accompanying a force engaged in contingency, humanitarian, peacekeeping or combat operations.

The Professional Services Council is the leading national trade association representing the professional and technical services industry doing business with the federal government. PSC's approximately 165 member companies perform billions in contracts annually with the federal government and other entities, from information technology to high-end consulting, engineering, scientific and environmental services. Many of our companies provide services that would be covered by this rule. In addition, many of our member companies are already providing a wide range of services to the Department in support of military and related missions around the world.

INTRODUCTION

We compliment the Department for moving forward with this proposed rule. Over a year ago, in a presentation to the Department's Defense Acquisition Excellence Council, we recommended that the Department undertake a review of the current regulatory coverage and develop department-wide coverage for contractors accompanying the force. We continue to strongly support the effort at achieving such uniformity. In June 2003, the General Accounting Office made a similar recommendation. However, because this proposed rule introduces too many new areas of conflict and ambiguity, it should not be adopted in its present form.

We also support providing authority for the military commander to have the flexibility to direct contractors accompanying the force and that such direction constitutes a change to the scope of work of the contract, although the commander may not authorize contractor employees to "engage in armed conflict with the enemy force." However, here too, we believe the proposed regulatory coverage will create further confusion in implementation.

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There are numerous aspects of the proposed policy and contract clause that make declarative statements about the risk and responsibilities accepted by (or shifted to) contractors. It is unmistakable that contractors' work in support of military and contingency operations is dangerous. It is clear that contracting with the U.S. Government is a voluntary action and that contractors generally understand the volatile nature of work accompanying a military force. However, as we point out in the detailed comments on individual provisions, we oppose provisions that simply shift the government's risk to the contractor or where the Department provides exculpatory language to avoid responsibility for its action.

In addition, this new rule has been promulgated amidst a series of other policy changes within DoD and the military departments. As such, before moving forward with this proposed DFARS rule, and to ensure the proper and clear integration and coordination of all of these policies and other guidance, we recommend that the Department host a public meeting of interested Defense Department officials and private sector organizations and companies to discuss this proposed rule and further identify critical issues that must be addressed in any final Defense Department regulation.

On September 8, 2003, the Director, Procurement and Industrial Base Policy in the Office of the Assistant Secretary of the Army (Acquisition) published an informative guidebook on "Contractors Accompanying the Force" that includes template contract language, background information on relevant DoD policies, and then-current resources. While this guide was not published for public comment, PSC has reviewed the document and discussed its contents with Army officials. In addition, on November 28, 2003, the Army published two interim rules amending the Army Acquisition Regulation to increase consistency in Army contracts that may require deployment of contractor personnel. See 68 Fed. Reg. 66738. The Army interim rules also add new solicitation provisions and contract clauses. On January 27, 2004, PSC submitted comments on those interim rules and we would be pleased to provide you a copy of those comments. In our comments, we supported the Army interim rules as providing significant and timely information to all of the contracting parties, and made numerous specific recommendations for changes to the interim rules. We understand that the Army is awaiting action on this DFARS rule and on a related Defense Department directive before finalizing their rules.

Also in the fall of 2003, the Air Force General Counsel's office issued updated guidance on contractors accompanying the force, highlighting then-current regulations. We have met with the Air Force General Counsel's office and discussed that coverage, as well.

Finally, there are existing DFARS policies and clauses (such as DFARS 225.802-70, entitled "contracts for performance outside the United States and Canada") that require, in part, defense contracting organizations to coordinate in advance with the overseas contract administration office and obtain in advance required approvals for performance of the contract to ensure that the installation can provide the requested base support (including exchange privileges, medical treatment, etc.). We understand that the Air Force, and possibly other military departments, is considering regulatory changes to implement this DFARS requirement. In this proposal, the substance of DFARS 225.802-70 is to be deleted and moved to internal DoD guidance.

SPECIFIC COMMENTS

The proposed rule seeks to add a new clause to implement the revised policy in Subpart 225.74 and the prescription for a contract clause in 225.7402-2. Our comments are keyed to the individual provisions of the proposed prescription and clause.

Proposed Revised Subpart 225.74

The proposed rule revises Subpart 225.74 to replace the existing "Anti-terrorism/Force Protection Policy" with this new coverage.

A. 225.7402-1 Government Support of Contractor Personnel Accompanying a Force

1. Subparagraph (a) seeks to create a basic rule that contractors "shall generally" provide their own in-country support for their personnel. However, subparagraph (b) addresses situations where Government-provided support is authorized or required. To avoid any implication that these are independent provisions, we recommend combining them into a single subparagraph. We further recommend providing that, to the extent that support is not authorized or required by the contract, or pursuant to direction of appropriate military commanders, the contractor is generally required to provide its own in-country support. A better formulation of this policy is provided in Paragraph (c) of the proposed 252.225-70xx Clause. If this subparagraph (a) and the clause are not consistent, we support the approach in the Clause.

2. We agree that, to the extent possible and known in advance, the "exact support to be authorized or required" shall be set forth in each contract. In fact, as part of the Government's planning function, the Government is the only one in a position to specify the nature and extent of Government-provided support that is authorized or required. Since these elements of support will have a significant impact on the nature of the companies interested and able to bid, and on the prices proposed for performing contracts based on the support provided, the Government has a special responsibility to carefully and fully plan for and disclose this support in the solicitation and the resulting contract. As paragraph (b) notes, examples of support elements to be considered are identified under the listed "PGI" section to be created as part of the separate DFARS transformation effort. We have not reviewed and have no comments on the PGI. However, to the extent personnel and physical security are elements of such coverage, we strongly recommend that it be explicitly covered as an example.

3. Of course, we acknowledge that circumstances will change as the operational situation changes; in such cases, we believe the existing Changes clause of the contract, and the additional special Changes provisions included in the proposed clause will provide a sufficient basis for providing appropriate adjustments to the contractor's contractual performance obligations and costs incurred.

4. With respect to subparagraph (b), it is highly unlikely that contractors, let alone offerors considering responding to a solicitation, will have access to the operational orders of the combatant commander. We recommend deleting this phrase.

5. On a related but important matter, the capitalized term "Combatant Commander" is defined in the proposed clause but not elsewhere in this prescription or in the definitions section of the DFARS. Furthermore, in this paragraph (2), the term "combatant commander" is not capitalized. For consistency, we recommend capitalizing the term in this paragraph and providing either an identical definition in Subpart 202 or in this Subpart, or providing a cross-reference to the definition used in the Clause. Furthermore, a different official (the "ranking military commander") is given authority to order emergency changes to the contract and still other officials (the "theater commander" and the CRC) are authorized to provide contractors OCIE and training. Where no difference is intended, the term "Combatant Commander" should be used throughout.

B. 225.7402-2 Contract Clause

The proposed rule adds a new prescription in 224.7402-2. The prescription is to be applied to solicitations and contracts when contractor performance requires contractor employees accompany, or be available to accompany, a force engaged in certain activities. (Emphasis added.) We support this broad scope of coverage and encourage the Department to carefully review this proposed clause and related policies to ensure that contractor actions that may have to be taken within the United States to support such a force deployed are covered by the same rules. For example, if a Combatant Commander requires a re-deployment of logistics support operations, a contractor might incur costs within the United States to support that operation, including transportation, personnel, and warehousing expenses. These activities should be covered by the Changes clause of the contract and covered by the specific policy provisions and the proposed clause.

C. Proposed New Clause 252.225-70xx

The proposed rule also adds a new clause to be included in all solicitations and resulting contracts when contract performance requires that contractor employees accompany, or be available to accompany, a force. Our specific comments on each paragraph of the proposed rule are below.

1. Paragraph (a) - Definitions

Paragraph (a) defines the term "Combatant Commander" as the single commander of a unified or specified command or any subordinate commander given authority by the Commander to issue direction. While the identity of the single Combatant Commander is usually known, the identity and scope of authority of subordinate commanders with authority to issue direction to contractors may not be as clear, even within the chain of command. It is unreasonable to expect contractors, let alone contractor employees deployed with the force, to know who is and is not authorized by the single Combatant Commander to issue orders to contractors. We do not object to the definition of the term. However, we are concerned that narrowly defining who has authority to direct contractors to take action, particularly in an emergency situation, will lead to confusion, questions and after-action disputes. Furthermore, paragraph (q) of the proposed clause uses the term "the ranking military commander in an area of operations;" it is unclear whether this

commander is or would be defined as a "Combatant Commander." Such conflicting guidance undercuts the value of a comprehensive, department-wide clause.

2. Paragraph (b) - General

This paragraph includes two separately numbered subparagraphs. Subparagraph (1) states that the contract may require the deployment of contractor personnel. We do not oppose this first provision.

Subparagraph (2) includes two sentences. The first provides that "contract performance in support of such forces is inherently dangerous." (Emphasis added.) We do not agree with the declarative statement that every element of contract performance is necessarily dangerous and we are concerned about the implications of such statement for competition, pricing and performance. By the same token, there are clearly specific functions, or operations in certain parts of the world at any given time, that are inherently dangerous. We do not believe the Department benefits from including a "standard" provision such as this to apply to all covered contracts and to all circumstances. If such language is necessary, we recommend that the clause provide that the contracting officer will designate (or the contractor will be asked to identify to the contracting officer) those activities or locations that are considered "inherently dangerous" under the specific contract or deployment.

The second sentence of this subparagraph provides that "The Contractor accepts the risks associated with required contract performance in such operations." As we noted above, to the extent that this sentence restates only the general rule of contractor obligations – that the contractor is responsible for fulfilling the obligations of the contract – we do not object to the sentence but find it unnecessary. However, to the extent that the intent of this sentence is to shift to the contractor all of the risk of performance without regard to specific provisions in the contract (or on the battlefield) that falls on the government, or that result from any changed operational circumstances, or from explicit direction of the contracting officer or orders from military officers, we oppose this provision.

3. Paragraph (c) - Support

These two numbered sentences provide that the Government may specify in the contract the support provided; otherwise the contractor is required to provide its own support. We believe the Government should be required to specify in the solicitation and resulting contract the types of support, if any, that will be provided. DFARS 225.802-70 now requires that. Absent such specification, the contractor is required to provide its own support.

4. Paragraph (d) - Compliance with laws and regulations

This paragraph requires that the contractor comply with, and ensure that its employees are familiar with, all foreign and domestic laws, treaties, U.S. regulations, certain orders and instructions of the Combatant Commander, and the Uniform Code of Military Justice, where applicable. This is an unreasonable and, in significant part, unnecessary obligation imposed on contractors accompanying a force.

To ensure the proper analysis of these requirements, we urge the Department to assess the implications of these requirements from three different perspectives: offerors bidding on a contract where deployed employees may be required; contractors awarded work where deployed employees may be required; and employees of contractors who may be deployed. In each case, the extent of information available and the need for various types of information can be better understood and appropriately enforced. For example, bidders may have less access to specific operational information then contractors; deployed employees may have no need for certain types of information that are unrelated to their specific work assignment.

There is no consistent, reliable and accessible source of information for contractors on all of the laws (particularly host country and "local" laws) that may be applicable to a contractor supporting a contingency or humanitarian effort. Frequently, a contractor is asked to deploy to countries or areas of the world on short notice without extended advance notice and without meaningful access to information on relevant foreign and local laws. Similarly, since many of the key elements of contractor coverage under Status of Forces Agreements are classified and not publicly or even readily available, contractors are often denied access to the very information that would be required to comply with this requirement. Similarly, as noted above with respect to government-provided support, rarely will contractors, let alone offerors, have access to any (and certainly not all) relevant orders, directives, instructions, policies and procedures of the Combatant Commander, even in those "narrow" areas specified in the clause

Significantly, while information about the existence of the Uniform Code of Military Justice may be available, there is a continuing legal debate about what obligations under the UCMJ, if any, are "applicable" to contractors and its employees and what it means to "comply" with them – particularly isolated from a specific set of facts. Like the criminal code in the United States, the general population understands what types of behaviors may constitute a crime; but it is only through application of a specific set of facts to the specific elements of the crime can a determination of guilt or innocence be made.

Finally, while there may be a reason for a contractor to have a basic understanding of the special laws and policies related to performance of a contingency contract, there is little need for all employees to have such comprehensive knowledge. As with any contract and any compliance obligations, contractors need to make a reasonable assessment of the scope of work specific employees are expected to perform and ensure that those employees have information on compliance obligations relevant to the employment generally and their specific assignment. Thus, it would be unreasonable to expect, and unnecessary for, a contractor employee engaged in dining facility support for the force to be provided information about the treaty obligations between the United States and a host country. On the other hand, without having to detail the legal basis for such information, it would be essential that these employees be told of significant local customs regarding religious observances.

Particularly in the unique and volatile circumstances likely to be covered by this clause, we believe both the Government and contractors share an obligation of developing and disclosing necessary information applicable to each specific operation.

5. Paragraph (e) - Contractor personnel

Subparagraph (1) provides that the contracting officer may direct the contractor to remove and replace personnel under certain circumstances. We acknowledge that the contracting officer should have such authority.

Subparagraph (2) requires the contractor to have a plan on file (and be available for review by the contracting officer and/or his/her representative) to fill vacancies and/or replace employees. As a general matter, we do not oppose such a requirement and believe such a plan to be a good business practice for contractors. We also agree with the specific focus on those employees who are designated as "mission critical employees" under the contract. Absent excusable performance, the contractor is required to continue performance of a contract even if specific persons are not available to perform. However, in the case when the contracting officer exercises the authority under subparagraph (1), or any other authority, to direct the contractor to remove and replace personnel, the contractor should have a reasonable opportunity to replace that employee, and may incur additional expenses that might be compensable under the contract. Even the existence of the most detailed plan must face the realities of implementation under the specific time and event situation.

6. Paragraph (f) - Personnel data

Subparagraph (1) requires the contractor to provide to the Government official designated by the contracting officer a current list of all employees in a theater of operation. If an automated system is to be used, the contracting officer will designate that system. As a general matter, we have no objection to the designated government official having a current list of contractor employees. However, the term "theater of operations" is not a specifically defined term and could create confusion as to which employees are in a given geographic location supporting specific activities. Furthermore, without more information on the types of "automated" systems that may be designated, we are concerned about the access that a contractor will have to keep the required information up-to-date, about the time and expense that a contractor will incur in preparing and maintaining that information, and about the security and privacy rights of the contractor and the employee in such information.

We suggest that this paragraph (1) be revised to require the contractor to maintain information of all employees deployed into a theater of operation as defined by the contracting officer for each covered contingency operation and that such information be available for review by the contracting officer and a government official designated by the contracting officer.

Regardless of whether this information is provided to the Government or maintained by a contractor, the contractual obligation to include such reporting requirement should be a specifically priced contract deliverable identified under covered solicitations and any resulting contracts.

Subparagraph (2) requires all employees to have a DD Form 93 on file with both the contractor and the designated government official. We have no objection to this provision.

7. Subparagraph (g) - Pre-deployment requirements

This paragraph requires the contractor to ensure that five enumerated elements specified in the clause are complied with before deploying an employee. As a general matter, while we do not object to the five designated elements, we are concerned that the contractor is required to have the full and exclusive knowledge of "all" applicable requirements, without the ability to implement the requirement in good faith.

As we noted above with respect to requirement in Paragraph (c) for the contractor to comply with "all laws," to our knowledge there is no consistent, reliable and accessible source of information for contractors on all of the vaccines, documents and medical and physical requirements that may be applicable to any specific deployment or to any specific employee supporting a contingency or humanitarian effort. Frequently, a contractor is asked to deploy to countries or areas of the world on short notice without extended advance notice and without meaningful and timely access to such information. Similarly, since many of the key elements of contractor coverage are not readily available, contractors are often denied access to the very information that would be required to comply with this requirement.

Thus, at a minimum, we recommend revising the lead-in of this paragraph to require compliance "to the best of the contractor's knowledge."

In addition, we are concerned with the second sentence of this paragraph that provides that specific requirements may be set forth in the statement of work or in the contract annex to the operational order. Since most contractors will not have access to the operational orders (or even the contract annex to such order), and those documents by themselves have no binding effect on contractors, we strongly recommend that all specific requirements be included in the solicitation and contract documents. As deployments require adherence to more specific information, this information should also be included in the contract through a bilateral modification; some of these specific requirements could have a significant impact on the available workforce, on the personnel plan to be maintained under Paragraph (e)(2) of this proposed clause, and on the cost of performance.

With respect to the specific items, we have the following additional suggestions.

In subparagraph (g)(1), the Government must specify, through the inclusion in the solicitation and resulting contract of the Form DD-254, Access to National Security Information, whether the contractor and its employees may be required to have access to certain national security information. If such a requirement is included in the contract, the security requirements will be fixed.

In subparagraph (g)(2), the contractor is required to ensure all vaccines are received. However, as existed in the early days of the Iraq deployment, only the U.S. government had access to certain types of vaccines required for deployed forces, and contractor employees were dependent on the government to provide those vaccines. Thus, there are circumstances when the contractor is unable to comply with this requirement. We acknowledge that if the Government provides the

vaccines, a contractor employee who "received" the vaccine and the contractor will be in compliance.

In subparagraph (g)(3), the contractor is required to ensure that its personnel possess the required licenses to operate "all vehicles or equipment." We recommend inserting the words "United States" before the word "licenses" to clarify that there is no obligation for U.S. contractors to search out or comply with any foreign requirements to operate vehicles or equipment –regardless of who owns the equipment or how the use of that equipment has been obtained for use in the performance of the contract.

Under subparagraph (g)(4), the contractor must have all necessary documents, including documents necessary to enter and exit an area of operations. As we saw in the case of Iraq, it took a few weeks after military operations began before the Office of Foreign Asset Control modified the restriction on non-military travel to, or spending money in or with, Iraq. Furthermore, we do not believe it is in the best interest of the United States to impose a requirement that a contractor obtain a foreign government's approval through entrance or exit visas before implementing a U.S. Government contract.

In subparagraph (g)(5), the contractor is required to ensure that "country and theater clearance requirements" are obtained. However, these are not common or standard requirements. To our knowledge, there is no single focal point or single issuing authority for these clearance requirements and what elements are included in such requirements. We strongly recommend that this provision either be deleted or significantly clarified so that offerors and contractors will know the source of these requirements.

8. Paragraph (h) - Military clothing and protective equipment

Subparagraph (1) prohibits contractors from wearing military clothing unless specifically authorized by the Combatant Commander, except items required for safety and security. While we support this provision, we recommend extending its provision so that contractors will only wear military clothing that is both "specifically authorized" and "necessary."

Subparagraph (2) permits the CONUS Replacement Center or theater commander to provide the contractor with OCIE. While we support this provision, we recommend that the government accept the responsibility to provide OCIE when such equipment is only available from the Government. Often the U.S. Government is the only source for some of this equipment and contractors being deployed to areas where such equipment is necessary should not be denied access because only the U.S. Government is the available source.

Subparagraph (3) requires any government-furnished property to be returned to the point of issue. While we support this provision, we recommend modifying the provision so that the equipment can also be returned to another point agreed upon by the contracting officer. For example, in the case of OCIE dispensed by the Fort Bliss CRC to a contractor being deployed to a theater of operation, it may be in the Government's interest to provide for the return of that equipment to a government location in the specific theater. This change will give the government

greater flexibility over the return of this equipment. A similar formulation is included in the last sentence of Paragraph (i) relating to the return of Government-issued weapons.

9. Paragraph (i) - Weapons

This paragraph addresses the authority of the Combatant Commander to authorize the carrying of firearms. This is a significant policy area that raises several matters.

Subparagraph (1) prohibits the possession of privately owned firearms unless specifically authorized by the Combatant Commander. We support this limitation.

Subparagraph (2) provides that the Combatant Commander may authorize a contractor employee (or category of employees) to carry firearms (in situations where the contract is for other than security and related services). We support the provision that requires the Combatant Commander to specifically permit the possession of such weapons. In addition to the Commander, we recommend an explicit statement that both the contractor and the contractor employee must also affirmatively consent to the employee carry such weapons. We also recommend that "only those employees specified by the contractor" be authorized to carry firearms since the contractor has the additional responsibility of ensuring compliance with designated federal law and for ensuring appropriate training is made available.

If the Commander does approve the carrying of firearms, and the contractor and the contractor employee agree, it is unclear if the prohibition on "privately-owned firearms" under paragraph (1) still applies. If the Commander does authorize such firearms, we believe the Commander "shall issue government-furnished firearms" or specifically authorize to employee to carry "only contractor-provided" firearms. Employee or other privately owned firearms should be prohibited in all cases. Upon termination of the Commander's authority, the contractor is required to return any government issued firearms according to the direction given by the contracting officer. If the employee is permitted to carry contractor-issued firearms, the employee must cease carrying those firearms and follow contractor-provided direction for their disposition.

10. Paragraph (j) - Next of kin notification

This paragraph requires the contractor to provide in-person notification of next-of-kin in four circumstances. We generally support this provision. However, we recommend: (1) that a lead-in phrase be added to the effect that "Unless otherwise provided in this contract or by direction of the contracting officer". This will allow flexibility to address this matter in the contract or after discussions with the contracting officer on the best way to provide such notification; (2) that the requirement for "in person" notification be deleted. While such notice may be the preferred method, contractors should have the flexibility to follow their own notification policies, while balancing timely notification with the respect for the interests of the employee and their families; and (3) the term "kidnapped" be added after "captured" in subparagraph (4). We are also sensitive to those unusual situations where the contractor will only know about the status of its employees after receiving notification (and verification) of status from the U.S. military.

11. Paragraph (k) - Evacuation of bodies

This paragraph provides that, in the event of the death of a contractor employee, the contractor is responsible for the evacuation of the body from "the point of identification." Here again, even when a contractor employee dies in the performance of work, and without regard to operational events or environment, the clause simply and completely shifts the responsibility of evacuation to the contractor in all circumstances. Such a policy is inconsistent with existing Defense Department policy; section 4.7 of DoD Directive 1300.22, entitled "Mortuary Affairs Policy," states: "The recovery, evacuation, preliminary identification and further disposition of remains and personal effects under the jurisdiction of the Military Services are command responsibility." We are not aware of a definition of the term "point of identification." Without such a clear understanding of that "point of identification," such a clause ignores the realities of the battle space and may make it impossible for anyone other than the U.S. military to safely provide for such evacuation. While a contractor may have the responsibility for evacuation of bodies from a safe location in the theater of operations to the location specified by the employee or next of kin, there should be a clearer demarcation point, coupled with a recognition that DoD policy already provides an appropriate responsibility for the military command.

12. Paragraph (l) - Evacuation

This paragraph addresses two distinct situations. Where the Combatant Commander orders a mandatory evacuation, the rule should be clear on the obligation of the contractor to continue performance. We believe such a mandatory evacuation is equivalent to a "stop work" order and would have the same effect whether issued by the Combatant Commander or the contracting officer.

Where the Combatant Commander orders a non-mandatory evacuation, the rule requires the contractor to maintain sufficient personnel to meet contractual obligations. This portion of the paragraph should be clarified so that, at a minimum, "mission essential" personnel remain available to meet contractual requirements. In addition, a cross-reference should be provided to changes in contract performance that may be required under paragraphs (p) and (q) of this clause.

13. Subparagraph (m) - Insurance

This paragraph has only one sentence: the contractor is responsible for "all issues" dealing with exclusions contained in an employee's personal insurance policies that may be provided through its compensation program. The purpose and intent of this sentence are confusing and must be clarified. To the extent that this provision purports to establish a limitation on the allowable compensation of deployed contractor employees accompanying a force, we oppose the provision.

There is an erroneous inference that contractors will or do provide employees with personal insurance policies over and above company-sponsored insurance coverage, or that the contractor is responsible for any gaps that may exist in personal coverage. If this provision is retained, we recommend including the phrase "if any" after the phrase "in an employee's personal insurance policies."

14. Paragraph (n) - Processing and departure points

This paragraph requires the contractor to use the government specified processing and departure point. We support this provision.

15. Paragraph (o) - Purchase of scarce commodities

This paragraph requires a contractor to obtain the approval of an organization established for identifying scarce commodities. While we generally support this provision, it is essential that the contractor be provided with notice about the existence of such an organization and the requirement to acquire scarce commodities through such an organization. If such an organization is not in existence at the time of contract formation, then the contractor remains obligated to execute the contract, including finding available sources of even scarce commodities.

16. Paragraph (p) - Changes and Paragraph (q)-Changes in emergencies

There are two paragraphs that address the issue of contract changes. Paragraph (p) addresses "changes" relating to all transportation, logistical and support requirements, and provides certain authority to the Combatant Commander. Paragraph (q) addresses "Changes in emergencies" and provides certain authority to the ranking military commander to direct the contractor in an emergency situation. While we address our concerns with the specific elements of each paragraph separately, we strongly recommend that these two paragraphs be revised accordingly and then consolidated into a single consistent paragraph with numbered subparagraphs if separate or additional guidance is necessary to address individual circumstances. Furthermore, it should be clear that these special clauses are in addition to the standard Changes clause of the contract.

Paragraph (p) - Changes

This paragraph provides specific authority to the Combatant Commander to instruct the contractor relating to all transportation, logistical and support requirements, requires the contractor to comply with those instructions, and provides that those instructions supercede any existing terms of the contract. We support granting this authority to the Combatant Commander, but believe this authority should be greatly expanded. By using the capitalized term "Combatant Commander," we believe the Department did not intend to limit this authority to ONLY a single official in a theater of operation. Paragraph (a) of this proposed clause defines the term "Combatant Commander" as the single commander of a unified or specified command or any subordinate commander given authority by the commander to issue direction. While the identity of the single Combatant Commander is usually known, the identity and scope of authority of a subordinate commander authorized to issue direction to contractors may not be as clear. Numerous military officers will have control over an area of operations and might be expected to issue orders to the contractor to address transportation, logistics and support requirements that should be complied with. Like paragraph (q) of the proposed clause addressing "Changes in Emergencies," at a minimum, the authority to issue direction should be available to the lowest levels of the military command, and the contractor should be entitled to comply with such direction in good faith.

This proposed clause is also unduly limited to "all transportation, logistical and support requirements." While admittedly a broad area of coverage, we can clearly envision military direction to the contractor that could create inconsistencies with contract performance that does not fall into the areas of " transportation, logistical and support requirements."

In addition, this paragraph is limited to those circumstances when the contractor must accompany or travel to an area "in order to meet contractual obligations." In fact, frequently a contractor will be directed to travel or to make adjustments to logistical or support operations because of changed military or situational circumstances that impact the contractor's ability to execute its work but is not necessarily "in order to meet contractual obligations." Here again, we believe the Combatant Commander should have the flexibility to issue direction necessary for the execution of the military mission; contractors should have the confidence that they can (and should) follow that direction without having to question the basis for the Combatant Commander's direction.

We believe the clause would be strengthened by also incorporating here a provision covered in paragraph (q)(1) that prevents the Combatant Commander from ordering contractors to engage in armed conflict.

We strongly support the language in paragraph (p)(2) that orders of the Combatant Commander take precedence over any existing terms of the contract.

We strongly support the language in subparagraph (p)(3) that provides authority for the contractor to submit a request for equitable adjustment for any additional effort expended or equipment lost. However, here to, the language does not go far enough. Since the paragraph (1) requires the contractor to comply with the direction given, we believe the clause should state that the contracting officer will ratify such changes to the contract and approve the request for equitable adjustment for all costs incurred and equipment lost in complying with the orders, except in instances of fraud or willful misconduct by the contractor.

Paragraph (q) – Changes in Emergencies

This paragraph addresses emergency situations where "an immediate possibility of death or terrorist activity to contracting personnel" may exist. While these are the most dangerous of situations, this clause imposes more stringent burdens on the contractor than the requirements in paragraph (p) of the proposed clause. As noted above, we recommend that this paragraph be substantially revised and expanded, and then consolidated with the revised provisions in paragraph (p).

In subparagraph (q)(1), we recommend the deletion of the first sentence as unnecessary. In the second sentence, we recommend the deletion of the phrase "when the contractor is accompanying the force outside the United States". The prescription in proposed 225.7402-2 already provides that this clause applies only to solicitations and contracts for performance outside the U.S. (But see our comment relating to expanding the scope of coverage of 225.7402-2, supra, to cover actions by a contractor within the United States following the Combatant Commander's direction.)

Next, we recommend deletion of the phrase "If the contracting officer or contracting officer's representative is not available." In an emergency situation that may cause "an immediate possibility of death or serious injury," contractors and their employees should not have to make any inquiry as whether a contracting officer or contracting officer's representative is or is not available (or even is "not available in a timely manner"). We hope there is no situation where a contracting officer, even if present, would overrule a military officer's direction to the contractor and its employees to undertake any action, other than to engage in armed conflict, and no situation where a contracting officer would deny an equitable adjustment to a contractor who complied with such action. This verification of availability of the contracting officer is not imposed on the contractor for purposes of complying with the order of a Combatant Commander under paragraph (p) above, and we do not believe it is appropriate here.

This paragraph also provides that the ranking military commander may issue direction to the contractor. The term "ranking military commander" is not defined in the proposed prescription or the clause. Here again, contractors should not have to guess as to whether the military officer providing direction is in the proper chain of command and authorized to direct the contractor's activities in an emergency situation. Absent affirmative knowledge to the contrary, we believe contractors who act in good faith on the orders of the military in an emergency situation should be entitled to a contract adjustment.

While this paragraph authorizes the ranking military commander to issue direction, unlike the provisions of paragraph (p)(1), it does not require the contractor to comply with such orders. Here, too, we cannot conceive of a situation where the contractor and its personnel would not comply with emergency action to minimize or avoid death or serious injury. We believe the clause would be strengthened by also incorporating here a provision covered in from paragraph (p)(1) requiring the contractor and its employees to comply with such instructions.

We also recommend that the emergency action situations contemplated by the proposal be broader than "an immediate possibility of death or serious injury." While we recognize this authority should be rarely used, the military leadership should have broad flexibility to respond to all types of emergencies, without the need to qualify the action as responding to an "immediate possibility" situation. Neither the Government nor the contractor benefit from such narrowly prescribed provisions. If commanders abuse the authority, then more restrictive language will be promptly put into effect.

We strongly recommend the addition of new language, similar to the language in paragraph (p)(2), that orders of the commander take precedence over any existing terms of the contract.

We strongly support the language in subparagraph (q)(2) that provides authority for the contractor to submit a request for equitable adjustment for any additional effort expended or equipment lost. However, here too, the language does not go far enough. Although paragraph (1) does not require the contractor to comply with the direction given (unlike the provisions of Paragraph (p)(1) above), it should be expected that the contractor would comply. Thus, we believe the clause should state that the contracting officer will ratify such changes to the contract and approve the request for equitable adjustment for all costs incurred and equipment lost in complying with the orders, except in instances of fraud or willful misconduct by the contractor.

18. Paragraph (r) - Subcontracts

This paragraph requires the prime contractor to incorporate the substance of this clause, including this paragraph, in all subcontracts that require subcontractor employees to accompany or be available to accompany a force. While we do not object to the policy, we are concerned about the ability of the prime contractor to flow down provisions to subcontractors that have the effect of committing the Government to undertake affirmative support of such subcontractors.

CONCLUSION

There is a need for an updated Defense Department-wide policy regarding contractors deployed with the force, and for a consistent, comprehensive contract clause that addresses significant policy, operational and contractual issues. The rule has two valuable attributes: department-wide coverage and authority for the military commanders to direct contractors to take action to address changing battlefield circumstances. Regrettably, even in these two areas, the rule creates more confusion than clarity. In addition, the proposed rule does NOT provide sufficient guidance to address the needs of both the government and the contractor community, imposes new and unnecessary requirements, and will introduce more ambiguity in the contracting community with this proposed coverage than exists today without the coverage. Therefore, the Professional Services Council does not support the proposed coverage.

For these reasons, we recommend that the Department host a public meeting of interested Defense Department officials and private sector organizations and companies to discuss this proposed rule and further identify critical issues that must be addressed.

Thank you for the opportunity to submit these comments. If you have any questions or need any additional information, please do not hesitate to let us know. I can be reached at (703) 875-8148 or at Chvotkin@pscouncil.org.

Sincerely,

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Senior Vice President and Counsel